

WT Docket No. 94-147 WTB Exhibit No. 5.

BROWN AND SCHWANINGER

LAWYERS

1835 K STREET, N.W.

SUITE 650

WASHINGTON, D.C. 20006

ORIGINAL
RECEIVED

MAY 18 1994

DENNIS C. BROWN
ROBERT H. SCHWANINGER, JR.
KATHLEEN A. KAERCHER†
NADJA S. SODOST
† NOT ADMITTED IN D.C.

(202) 223-8837

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
1270 FAIRFIELD ROAD, SUITE 16
GETTYSBURG, PENNSYLVANIA 17325

May 17, 1994

W. Riley Hollingsworth
Deputy Chief, Licensing Division
Federal Communications Commission
Gettysburg, Pennsylvania 17325

Re: Application Nos. 415060, 415243, 415255,
415274, 628816, 632210

Dear Mr. Hollingsworth:

We represent the radio system interests of James A. Kay, Jr. before the Federal Communications Commission. On behalf of Mr. Kay, we hereby respond to your letters dated May 11 and May 13, 1994, concerning the above referenced application file numbers.

We are somewhat puzzled by your request, because your letter states that "the Commission requires answers to [its] letter to [Mr. Kay] dated January 31, 1994," but it is clear from the final paragraph of your letter that you have, in fact, received the answers to your inquiry which we had filed on behalf of Mr. Kay. Your letter also stated that "the Commission needs more information in order to determine what action to take on the above referenced applications," but you did not request any information other than the information had been requested by your letter dated January 31, 1994, and to which request Mr. Kay has already responded.

We respectfully note that we have filed the number of copies of Mr. Kay's response which are required to be filed by Section 1.51 of the Commission's Rules. However, you have requested 50 additional copies of Mr. Kay's response. Since the Commission could not possibly require 50 copies for its own internal use, the only reasonable conclusion is that the Commission intends to make further circulation of Mr. Kay's response beyond the Commission. It was specifically to prevent such distribution of Mr. Kay's response that Mr. Kay requested confidentiality for his response and provided the Commission with notice of his copyright. If someone outside the Commission requests a copy of Mr. Kay's

Federal Communications Commission
Docket No. 91-147 Exhibit No. 5
Presented by Wireless Telecommunications Bureau
Disposition
Reported by Identified
Date 11-30-98 Received
Rejected

response, we suggest that the Commission direct the person to Mr. Kay, the proprietor of the copyright, to whom they can make an offer for a copy.

The Commission has required that Mr. Kay supply a "full justification of how the copyright laws apply, including statutory and case cites with your request." On behalf of Mr. Kay, we respectfully note that Mr. Kay is not a lawyer and is not qualified to advise the Commission on copyright law. Because we represent Mr. Kay in this matter and because our advising the Commission in the matter of copyright law would clearly be in conflict with our duty to Mr. Kay, we must respectfully decline to advise the Commission concerning its obligations under the law of copyright. We can, if the Commission requests, refer the Commission to a firm which practices in the field of copyright and with whose services some of our clients have expressed satisfaction.

Your May 11 letter specified that the reason for the Commission's request for information was "to determine whether [Mr. Kay is] qualified to be a Commission licensee". However, Section 308(b) of the Communications Act of 1934, as amended, states that "all applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical or other qualifications of the applicant to operate the station." (emphasis added) Mr. Kay respectfully submits that each of the above referenced applications already sets forth all the facts concerning his citizenship, character, and financial, technical or other requirements as the Commission has by regulation prescribed.

Your letter dated January 31, 1994, requested, among other things, "(1) the call signs and licensee names of all facilities owned or operated by you or by any companies under which you do business. Annotate those facilities which are located on U.S. Forest Service land." In both your January 31 letter and your May 11 letter you stated that the reason for your inquiry was to determine whether Mr. Kay was qualified to be a licensee. The Commission's regulations do not prescribe that an application include the information which was requested by your question number one, or by any of your other questions for purposes of demonstrating that an applicant is qualified to be a Commission licensee.

Since the Commission has not by regulation prescribed that any of the above referenced applications include the facts which you have requested for purposes of determining whether Mr. Kay is qualified to be a Commission licensee, we trust that the Commission will recognize that dismissal of Mr. Kay's applications for failure to provide any of the information which the Commission has requested would violate Mr. Kay's constitutional right to due process of law.

With respect to certain of the above referenced applications, none of the information which was requested by your January 31 letter would be material to action on them. The application referenced by file number 415243 requests only an increase in the number of authorized mobile units, and none of the information which you requested would have any bearing on whether the Commission should grant or deny the requested increase. Not information concerning neither use of U.S. Forest Service lands, nor the extent of loading on other stations, nor the identity of Kay's customers could have any reasonable effect on

whether the Commission were to grant or deny file number 415243. Therefore, the Commission should grant that application without further delay.

Application file numbers 628816 and 632210 request modification of trunked system licenses to merge channels on which Mr. Kay is already authorized to operate. To the extent that the Commission's January 31 letter requested information which might be material to action on those applications, the request for information was entirely too broad and requested extensive information which would not be relevant. If the Commission needs specific additional information which is directly relevant to its consideration of file numbers 628816 and 632210, we suggest that the Commission request that specific information.

Application file numbers 415060, 415243, and 415274 request authorization for new two-way private carrier facilities. To the extent that the Commission's January 31 letter requested information which might be material to action on those applications, the request included extensive information which would not be relevant. If the Commission needs specific additional information which is directly relevant to its consideration of file numbers 415060, 415243, and 415274, we suggest that the Commission request that specific information.

Your January 11 letter described the nature of reported complaints concerning Mr. Kay. As you know, Mr. Kay has requested inspection of those complaints under the Freedom of Information Act, but the Commission has declined to allow Mr. Kay to inspect that information, suggesting, in part, that that information may have been disposed of in some undisclosed manner by the Chief of the Land Mobile Branch. Mr. Kay's lack of knowledge of the charges which have been made against him impairs his ability to respond to the Commission's inquiries.

The Commission has failed to comply with the law concerning Mr. Kay's FOIA request, and we are therefore, concurrently with this letter, filing a complaint with the Federal District Court for the District of Columbia concerning the Commission's refusal to disclose the requested information. Until that litigation is concluded, it would be unjust for the Commission to take any action adverse to Mr. Kay as the result of the complaints which the Commission has reportedly received. Accordingly, we respectfully request that the Commission avoid taking any further action concerning its January 31 letter until such time as the court has decided whether the Commission should disclose the related information which he has requested.

Mr. Kay is a citizen of the United States, and, therefore, his citizenship should not be in issue. Mr. Kay believes himself to be a law abiding person. Mr. Kay has never been convicted of any crime other than minor motor vehicle traffic law violations, and no indictment for any crime is pending against him in any jurisdiction. Accordingly, his character should not be in issue. The Commission did not ask any question concerning his finances, but he is fully qualified financially to construct and operate all of the facilities for which he is authorized and for which he has requested authorizations and is certain that any inquiry into his financial qualifications would find him to be financially qualified to be a Commission licensee. Although it does not appear from the Commission's questions that Mr. Kay's technical qualifications are at issue, Mr. Kay would place his technical

qualifications up against those of any other licensee for the class of station requested by each of the above referenced applications. For the foregoing reasons, Mr. Kay can conclude only that someone has alleged that he somehow lacks one of the "other qualifications" to be a Commission licensee. However, without knowing the exact nature of the unlawful actions which he has allegedly committed, Mr. Kay is at a loss to understand how the Commission might have concluded that any of the information which it has requested constitutes a fact which the Commission has by regulation prescribed be submitted in the above referenced applications as to his citizenship, character, and financial, technical, or other qualifications to be a Commission licensee.

We respectfully suggest that some progress might be made in this matter if the Commission would request specific information concerning each of the above referenced applications which it finds to be lacking from the application and which the Commission has by regulation prescribed that such application contain as to the applicant's citizenship, character, and financial, technical, or other qualifications to be a Commission licensee, or such information which it requires which does not relate to Mr. Kay's qualifications. If, however, the Commission concludes that the information which it requested by its January 31 letter is not by regulation prescribed to be submitted in an application as to the applicant's citizenship, character, and financial, technical, or other qualifications to be a Commission licensee, then we respectfully suggest that the Commission withdraw its request dated January 31 and grant Mr. Kay's above referenced applications without further delay.

In an earlier letter to you concerning another of Mr. Kay's applications, we explained that deferral of action on an application constitutes a sanction. Similarly, delay in action on the above referenced applications would impose a sanction on Mr. Kay prior to his having been found to have violated any rule or law.

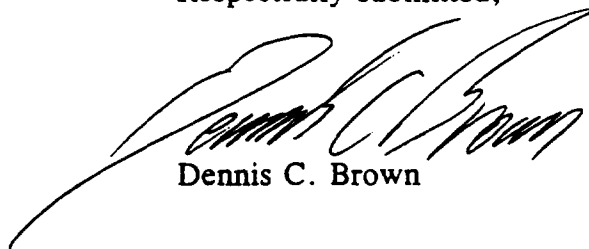
In its Order in Century Southwest Cable Television Corp., _____ FCC Rcd. _____ (DA 94-489 Released May 13, 1994), the Cable Services Bureau was confronted with a situation in which a local franchising authority had imposed a sanction, namely, reduced the rate which the cable operator could collect from its customers to zero. At paragraph eight of its Order, the Commission found that "West Hollywood has conceded that it temporarily set Century's installation rates at zero to encourage Century's full compliance with the City's repeated requests for more information." The Commission stayed the effectiveness of West Hollywood's sanction on Century. Analogous to its action in Century, the Commission should not consider using the dismissal of Kay's applications as leverage to attempt to obtain some desired action from Mr. Kay.

The Commission's Standards for Assessing Forfeitures do not include the dismissal of applications as a lawful sanction for a person's allegedly failing to supply requested information. To avoid violating Mr. Kay's constitutional right to due process of law, the Commission should not attempt to impose an unlawful sanction on Mr. Kay.

Your May 11 and May 13 letters referenced Mr. Kay's applications by file number. Section 1.953(a) of the Commission's Rules provides that "applications are processed in sequence according to date of filing," and Rule Section 90.611(b) provides that "all applications in pending status will be processed in the order in which they are received,

determined by the date on which the application was received by the Commission in its Gettyburg, PA office," or the by the Mellon Bank. With due attention to Mr. Kay's constitutional right to due process of law, would you please inform us whether the Commission has acted on any application which was filed on a date later than any of the six, above referenced applications.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis C. Brown", is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Dennis C. Brown

WT Docket No. 94-147 WTB Exhibit No. 6.

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

May 20, 1994

VIA REGULAR AND CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Dennis C. Brown, Esquire
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006

Re: Compliance File No. 94G001; James Kay

Dear Mr. Brown:

On April 8, 1994, you submitted a letter on behalf of your client, James A. Kay, Jr., in reply to a Commission inquiry dated January 31, 1994, requesting information pursuant to § 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b).

Kay's letter is inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission. Kay's letter represented a studied effort to avoid producing any information. His failure to disclose pertinent information to the Commission has raised a substantial question about his qualifications to be a Commission licensee. The response is elusive and apparently designed to conceal his operating practices. Kay failed to adequately answer any single question included in our inquiry. Kay is directed to file a fully responsive submission within fourteen (14) days of the date of this letter.

With respect to Kay's request that information provided to the Commission in response to our inquiry be withheld from public inspection, we will not make those materials which are specifically listed under the provisions of Rule 0.457, 47 C.F.R. § 0.457, routinely available for inspection to the public. Therefore, materials which include any information containing trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, will not be made routinely available to the public. Under the provisions of Commission Rules 0.457(d)(2)(i) and 0.461, 47 C.F.R. §§ 0.457(d)(2)(i) and 0.461, a persuasive showing as to the reasons for inspection will be required for requests submitted by the public pursuant to Rule 0.461, which seek information not routinely made available for public inspection under Rule 0.457. You are reminded of your obligation to physically separate those materials to which the request for nondisclosure applies from any materials to which the request does not apply. If a physical separation is not feasible,

Federal Communications Commission	
Docket No. <u>94-147</u>	Exhibit No. <u>6</u>
Presented by <u>Wireless Telecommunications Bureau</u>	
Disposition	<input checked="" type="checkbox"/> Identified
	<input checked="" type="checkbox"/> Received
	<input checked="" type="checkbox"/> Rejected
Reporter <u>Shu</u>	<u>Bell</u>
Date <u>11-30-96</u>	

the portion of the materials to which the request for nondisclosure applies must be identified. See, Rule 0.459(a).

Kay's claim that the Commission recently disclosed financial information in a finder's preference matter, which target Joseph Hiram requested be kept confidential, is frivolous. In response to a finder's preference request filed by your office on behalf of Kay, Hiram filed three letters stamped "confidential" as part of his Opposition. Hiram later advised the Commission that the three letters could be released to your law office. In a conversation with a member of my staff on March 17, 1994, attorney Katherine Kaercher of your office was advised that the three letters were being released with Hiram's permission. The letters were sent via telefax to your office that same day, with a note that Kay had an additional ten day period in which to comment on the letters. **In light of your firm's knowledge that Hiram's request for confidentiality had been withdrawn, your claim on behalf of Kay that the Commission wrongfully released confidential information is deceptive and highly improper.**

We clearly stated in our letter that we have received complaints alleging that numerous facilities are licensed to Kay on U.S. Forest Service lands but do not have the requisite permits for such use. We went on to explain that without the permits, there is a presumption that those facilities were not constructed and made operational as required by our Rules. Whether or not a station is located on U.S. Forest Service lands is therefore relevant to the stated purpose of the Commission's inquiry. The Commission has also received complaints that Kay's actual loading is inconsistent with the loading that he has reported to the Commission and to the U.S. Forest Service.

Kay should be advised that under the provisions of § 308(b) of the Act, id., the Commission has authority from Congress to require from an applicant or licensee "such other information as it (the Commission) may require," at any time after the filing of an application or during the term of any license. The Commission's resources are to benefit the entire public, not solely to benefit only one licensee.

When asked to name the "type of facility" for each call sign, Kay argued that this request was "not sufficiently specific" to allow him to be sure what the Commission requested. However, he suggested that the requested information is already within the Commission's records.

If Kay did not understand how to respond to the question calling for "type of facility", he had ample opportunity to contact the Commission during the initial 60 day time period provided to respond. Furthermore, on February 17, 1994, your office submitted

a request with the Commission, on Kay's behalf, seeking a tolling of the 60 day period of time in which Kay had to respond to our inquiry, until such time as the Commission replied to the statements in the February 17, 1994 request. In reply, Kay was granted an additional 14 days to supply the information we requested in our January 31, 1994 inquiry letter. If Kay needed clarification of one of our questions, it was his duty to seek it from us prior to the April 14, 1994 revised deadline. He had ample time to seek clarification, but elected not to do so. However, Kay is advised that the term "type of facility", as requested under heading number 2 of our January 31, 1994 inquiry letter, relates to the radio service in which the facility was licensed (i.e., YX, GX, YB, GB, etc.).

As part of our inquiry, the Commission requested that Kay provide a listing of the total number of units operated on each station, with a demonstration of such use substantiated by business records. Kay refused to respond, stating that the question was not sufficiently specific for him to supply the requested information, since "at any given instant of time, Mr. Kay may not know the number of mobile units operated on each of his stations." Kay later states that he "is currently spending one full day per week in the activity of collecting his charges from delinquent customers." Kay's refusal explanation is therefore contradictory, since he must have knowledge of his customer base to be aware of account delinquencies. His refusal to respond is also inexcusable since he was afforded an ample opportunity to clarify the window of time during which the information was requested. Kay is advised, however, that the Commission requests a listing of the total number of units operated on each station for all facilities owned or operated by Kay, or by any companies under which he does business, as of January 31, 1994, (the date of our initial inquiry). Kay is reminded that such demonstration of use during this period must be substantiated by business records.

Failure to provide the requested information constitutes a violation of the Commission's Rules and will subject Kay to sanctions, including a hearing before an Administrative Law Judge to determine whether Kay's licenses should be revoked.

We note that on May 11 and 13, 1994 Kay was notified that we would need an answer to our inquiry in order to determine what action to take on application numbers 415060, 415243, 415255, 628816, 632210 and 415274. We asked for responses by May 25 and May 27, respectively. Those response dates are extended to June 3, 1994 to conform with the instant letter.

The Communications Act requires that a response to a § 308(b) inquiry be signed by the applicant and/or licensee. Please direct Kay's signed response to my attention at the letterhead address.

Sincerely,

A handwritten signature in dark ink, appearing to read "W. Riley Hollingsworth". The signature is fluid and cursive, with the first name "W." and last name "Hollingsworth" clearly distinguishable.

W. Riley Hollingsworth
Deputy Chief, Licensing Division

WT Docket No. 94-147 WTB Exhibit No. 7.

BROWN AND SCHWANINGER

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KATHLEEN A. KASCHER
NADJA S. BODOS
* NOT ADMITTED IN D.C.

(202) 223-8837

GETTYSBURG OFFICE
1270 FAIRFIELD ROAD, SUITE 16
GETTYSBURG, PENNSYLVANIA 17325

May 25, 1994

W. Riley Hollingsworth, Deputy Chief
Licensing Division
Federal Communications Commission
Gettysburg, Pennsylvania 17325

Re: Compliance File No. 94G001; James Kay

Dear Mr. Hollingsworth:

In your letter dated May 20, 1994, concerning the above referenced matter, you indicated that the Commission would be willing to clarify its request that Mr. Kay supply it with certain information. Your letter to Mr. Kay dated January 31, 1994, had not indicated that any clarification might either be required or provided. However, your letter dated May 20 indicates that clarification might be possible. Accordingly, we respectfully request clarification of certain portions of the Commission's request.

The Commission's January 31 letter stated that the Commission had received "complaints questioning the construction and operational status of a number of [Mr. Kay's] licensed facilities." The Commission has declined to release those reported complaints, and, therefore, we have filed suit against the Commission, requesting disclosure of the information under the Freedom of Information Act. Although the Commission has declined to disclose the reported complaints, your statement that the complaints question "a number" of Mr. Kay's stations indicates that the complaints were made with reference to certain of the facilities which Mr. Kay is authorized to operate. We must also assume that the complaints were made with reference to specific facilities because it would be beyond reasonable belief that the Commission would take any action on a complaint that was not specific as to a certain facility. However, rather than requesting information concerning those facilities about which it had reportedly received complaints, the Commission has requested essentially all of the information which Mr. Kay might have concerning all of the stations which he operates. Deprived of an opportunity to inspect the reported complaints, one must believe that the Commission's dragnet was thrown entirely too wide to obtain only information necessary to the Commission's handling of the reported complaints. Accordingly, we hereby request clarification of the Commission's request such that it specifies the facilities about which

Federal Communications Commission
Docket No. 91-147 Exhibit No. 7
Presented by Wireless Telecommunication Bureau
Disposition { Identified ✓
Received ✓
Rejected Bell
Reporter Shaw
Date 11-30-98

complaints are being held and such that it requests information only about those specific stations and only such information as would allow the Commission to ascertain the veracity of the complaints.

We respectfully suggest that, for example, items one through five of the Commission's January 31 letter might be clarified to state that the Commission had received a complaint that stations WABC123 and WABC124 were authorized to be located on United States Forest Service land, but that a complainant had alleged that Mr. Kay's Forest Service permit did not include the frequencies authorized by the licenses for stations WABC123 and WABC124. Accordingly, items one through five might be clarified to request that Mr. Kay demonstrate that those specific stations had been constructed and placed in operation in a timely manner.

Item six of the Commission's January 31 letter might be clarified, for example, to state that the Commission had received a complaint that the actual loading on stations WABC123 and WABC124 did not realistically represent the actual loading of those stations. Accordingly, item six might be clarified to request that Mr. Kay state the loading on each facility for which a complaint was being held, and to instruct him that he be prepared to prove his statement of the loading by business records, if the Commission later determined that such proof was required. Were inspection of such business records ultimately required, we would respectfully suggest that the most practical approach to such an inspection would be for a Commission employee to inspect the records in Mr. Kay's offices and to make such notes as the Commission might then need to be able to verify Mr. Kay's statement of loading.

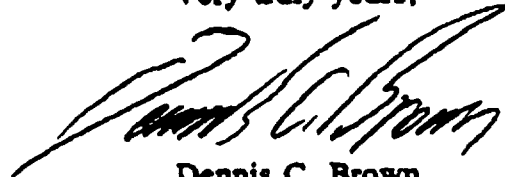
In the process of clarifying its request, the Commission might want to scrutinize the complaints to assess the likely validity of each item in the light of its knowledge of the credibility of the complaining parties and in light of its knowledge of the benefits which they may hope to gain by harassing Mr. Kay. If such review does not persuade the Commission that the complainant has not made out a *prima facie* case on a particular item, then respectfully suggest that the Commission might reduce not only the burden that it would put on Mr. Kay, but the burden which it would shoulder for itself by taking dispositive action with respect to that item.

While Mr. Kay might not be convinced that the complainants had presented a *prima facie* case sufficient to support a finder's preference request, and might not be convinced that whether his Forest Service permits reflected every frequency for which the Commission has granted him a license has any bearing on his character qualifications to be a licensee, Mr. Kay would not need to raise such procedural objections were the Commission to clarify its request as suggested. Were the Commission able to clarify its request so that it allowed Mr. Kay to confront directly the exact accusations which have reportedly been made against him, he believes that he may well be able to respond promptly and fully to such a clarified request and satisfy the Commission's interest.

As explained above, Mr. Kay has filed suit against the Commission, seeking an order that the Commission disclose certain information which is directly related to the Commission's January 31 request. Accordingly, if the Commission is unable to clarify its request for information as suggested herein, we respectfully request that the Commission defer the time for Mr. Kay's response to its recent letters until 14 days after the FOIA litigation has been concluded beyond further appeal. If the Commission is able to clarify its request as suggested herein, Mr. Kay respectfully requests that the Commission provide him with a reasonable period of time within which to respond to the clarified request.

In your letter dated May 20, 1994, you expressed displeasure concerning our reference to a matter involving Joe Hiram Trucking, Inc., and you stated that in a conversation with a member of your staff, Ms. Kaercher of our office had been advised that the information which the Commission disclosed concerning Mr. Hiram had been disclosed only after Mr. Hiram had released his claim of confidentiality. Until your letter dated May 20, I had no personal knowledge that Mr. Hiram had released his claim of confidentiality and Ms. Kaercher tells me that she has no recollection of having been informed that Mr. Hiram had released his claim. Nevertheless, if the events were as you have described them, you and your staff certainly have my apology for our misunderstanding. Further, you have my assurance that no deception or other improper action was intended by reference to the information which was submitted by Hiram.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Dennis C. Brown", written in a cursive style.

Dennis C. Brown

WT Docket No. 94-147 WTB Exhibit No. 8.

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

May 26, 1994

VIA FACSIMILE - CERTIFIED MAIL - RETURN RECEIPT REQUESTED -
REGULAR MAIL

Dennis C. Brown, Esquire
Brown and Schwaninger
Suite 650
1835 K Street, N.W.
Washington, DC 20006

Re: Compliance File No. 94G001; James Kay

Dear Mr. Brown:

This is in response to your letter of May 25, 1994 arguing that the Commission's request should be narrowed in focus and clarified.

The Commission's request asks for basic information that Mr. Kay would have readily available if he is indeed providing communication services to customers. In fact, such information would be a necessity in order to even issue monthly bills to users of the many systems for which he is apparently licensed.

The request is sufficiently clear, and the due date for response remains June 3. We note that on June 3 Mr. Kay would have had over 120 days to provide the information on his stations, certainly a reasonable period.

Sincerely,

W. Riley Hollingsworth

W. Riley Hollingsworth
Deputy Chief, Licensing Division

Federal Communications Commission	
Docket No. <u>94-147</u>	Exhibit No. <u>8</u>
Presented by <u>WTB</u>	
Disposition	Identified <input checked="" type="checkbox"/>
	Received <input checked="" type="checkbox"/>
	Rejected <input type="checkbox"/>
Reporter <u>Ann Ben</u>	
Date <u>11-30-98</u>	

Page 1 of 1

WT Docket No. 94-147 WTB Exhibit No. 9.

BROWN AND SCHWANINGER

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KATHLEEN A. KAERCHER†
NADJA S. SODOST
† NOT ADMITTED IN D.C.

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GETTYSBURG OFFICE
1270 FAIRFIELD ROAD, SUITE 16
GETTYSBURG, PENNSYLVANIA 17325

May 26, 1994

W. Riley Hollingsworth, Deputy Chief
Licensing Division
Federal Communications Commission
Gettysburg, Pennsylvania 17325

Re: Compliance File No. 94G001; James Kay

Dear Mr. Hollingsworth:

In your letter to our office dated May 26, 1994, you declined to clarify the Commission's January 31, 1994, request for information in accord with the suggestions of our letter to you dated May 25, 1994. If the Commission is unable so to clarify its request, then we respectfully request clarification of the following points of the Commission's January 31 request.

At Item one of the Commission's January 31 letter, the Commission requested that Mr. Kay "list alphabetically the call signs and licensee names of all facilities owned and operated by [Kay] or by any companies under which [Kay does] business." In our letter to you dated April 7, 1994, we stated that "we respectfully submit that the requested call sign and licensee name information is already within the Commission's possession." Since the Commission would appear clearly to already have all of the information which was requested by Item one of its request, would the Commission please clarify its request to specify the call sign and licensee information requested by its Item one which it does not already have in its possession and which it has any actual need for Mr. Kay to submit.

Also at Item one of the Commission's request, the Commission requested that Mr. Kay "annotate those facilities which are located on U.S. Forest Service land." Mr. Kay has declined, to date, to supply that information for the reason that whether or not a station is located on U.S. Forest Service land is not relevant to the stated purpose of the Commission's inquiry, namely, whether Mr. Kay is qualified to be a Commission

Federal Communications Commission	
Docket No. <u>91-147</u>	Exhibit No. <u>9</u>
Presented by <u>Wireless Telecommunication Bureau</u>	
Disposition	Identified <input checked="" type="checkbox"/>
	Received <input checked="" type="checkbox"/>
	Referred <input checked="" type="checkbox"/>
Reporter <u>Shank</u>	
Date <u>11-30-91</u>	

licensee. Your request stated that "complaints allege that numerous facilities licensed to [Mr. Kay] are on U.S. Forest Service land, but do not have the requisite permits for such use." To the extent that the Commission might have any need for information concerning stations licensed to Mr. Kay at sites within the jurisdiction of the Forest Service, it would appear that the complaints submitted to the Commission have already identified the facilities which were challenged with respect to construction. Since the fact of whether a station is located on U.S. Forest Service land is not within the Commission's jurisdiction, would the Commission please clarify its request to explain how the requested information is relevant to the stated purpose of its request.

At Item two of its request, the Commission requested that Mr. Kay provide for each call sign listed in Item one, the original date of grant of the call sign, the date the licensed station was constructed and placed in operation, and the type of facility. You have clarified the request to indicate that "type of facility" refers to the Radio Service in which the station is authorized. With that clarification, it would appear that the Commission already has the original date of grant of each license which it has issued to Mr. Kay and already has the information which it requested concerning the type of facility. To the extent that Mr. Kay is required to have reported information to the Commission concerning construction and operation, such information is already in the Commission's possession. Since it would appear that the Commission already has all of the information which it requested with respect to records which Mr. Kay is required by the Commission's Rules to keep, would the Commission please clarify Item two of its request to specify the information which it requires Mr. Kay to keep and which the Commission does not already have in its possession.

At Item three of the Commission's request, the Commission requested that Mr. Kay "provide a copy of the U.S. Forest Service permit for those facilities constructed and made operational on U.S. Forest Service lands." At Item four of the Commission's request, the Commission requested that, if Mr. Kay does not hold a Forest Service permit for any station which is authorized on U.S. Forest Service lands, Mr. Kay explain the reason that he does not hold such a permit. Since the Commission's Rules do not require a licensee to obtain a permit from the U.S. Forest Service, and since the Commission has no jurisdiction over the use of Forest Service lands, it would not appear that whether Mr. Kay held any Forest Service permit, whatsoever, would have any relevance to his qualifications to be a Commission licensee. We respectfully submit that even if Mr. Kay held no Forest Service permits and had a large number of stations located on Forest Service land, the Forest Service might have cause to be unhappy with him, but Mr. Kay would not have violated any Commission rule. Accordingly, would the Commission please clarify its request to indicate the relevance of the requested information to the stated purpose of its request.

In its letter dated May 20, 1994, the Commission stated that "materials which include any information concerning trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, will not be made routinely available to the public." However, Mr. Kay notes that, although he requested

confidentiality of his letter to the Commission dated April 7, 1994, the Commission requested that he submit 50 copies of it, which, to Mr. Kay, clearly indicates a Commission intent to disclose that information to a substantial number of members of the public, even though Mr. Kay has not received notice from the Commission that any person had requested the information.

At Item five of its request, the Commission requested that Mr. Kay supply the name of each of his users, the user's business address, the user's phone number, and the user's contact person, along with the number of mobile units, and for trunked systems, the number of control stations operated by the user. Based on the Commission's request for 50 copies of his letter dated April 7, Mr. Kay has no confidence that the Commission would not disclose such crucial information to other persons, whether routinely or non-routinely. Accordingly, would the Commission please clarify its request to state that, under no circumstances, whatsoever, would the Commission disclose to any person, other than a Commission employee, the name or business address or telephone number or contact person of any of Mr. Kay's users. Would the Commission also clarify its request to state how the identity of his users is relevant to the stated purpose of the Commission's Request.

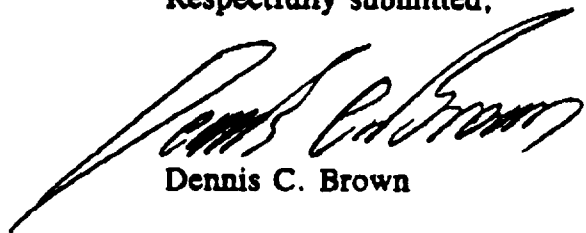
The Commission has clarified Item six of its request to request a "listing of the total number of units operated on each station for all facilities owned or operated by Kay, and by any companies under which he does business." In response to the Commission's clarified Item six, Mr. Kay states that his business records substantiate that a total in excess of 7,000 mobile units and control stations operate in association with all of the facilities which he and his companies own or operate.

In the Commission's letter dated May 20, 1994, the Commission stated that "failure to provide the requested information constitutes a violation of the Commission's Rules and will subject Kay to sanctions, including a hearing before an Administrative Law Judge to determine whether Kay's licenses should be revoked." We respectfully submit that the Commission's January 31 request referred to Section 308(b) of the Communications Act as the source of authority for its request, and not to any Commission Rule. Accordingly, imposing a sanction on Mr. Kay for violation of some Commission Rule with respect to this matter would not appear to be lawful. To the extent that a failure by Mr. Kay might constitute violation of a Commission Rule, we respectfully submit that the Standards for Assessing Forfeitures, _____ FCC Rcd. _____ (FCC 93-382 Released August 12, 1993), modifying Standards for Assessing Forfeitures, 6 FCC Rcd. 4695 (1991), do not include a hearing before an Administrative Law Judge as a lawful sanction. In view of the Commission's statement in its May 20 letter that it would impose on Mr. Kay a hearing before an Administrative Law Judge as a sanction, we would expect to move immediately for dismissal of any order to show cause on the basis that such a hearing, itself, was intended by the Commission as a sanction, and thus was both an abuse of the Commission's processes and a violation of Mr. Kay's civil rights.

In view of the Commission's express intent to impose a revocation hearing on Mr. Kay as a sanction for any failure by him to produce the information demanded by the Commission's January 31 request, and in view of the Commission's apparent inability to commence such a hearing untainted by its express intent to use the hearing process, itself, as a sanction, the Commission may desire to reconsider its letter to our office dated May 26, 1994.

In reconsidering its letter to office dated May 26, the Commission should also reconsider its refusal to extend the time for Mr. Kay's response to a date following the conclusion of the currently pending Freedom of Information Act litigation. As you will recall, one of the issues in that matter is whether all of the documents for which inspection was requested actually exist. Accordingly, we respectfully suggest that the Commission's demand that Mr. Kay submit information on June 3, 1994, is premature. Therefore, we respectfully again suggest that the Commission should afford Mr. Kay a reasonable period of time to respond to the Commission's request until such time as the FOIA action has been concluded beyond the possibility of appeal.

Respectfully submitted,



Dennis C. Brown